No. 83-864

In the Supreme Court of the United States

OCTOBER TERM, 1983

KENNETH JOE WHITTEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether all items seized pursuant to a valid search warrant should have been suppressed because the officers conducting the search also seized items not specified in the warrant.

2. Whether petitioner's Fourth Amendment rights were violated when officers, having already lawfully heard the contents of a telephone message as it was played aloud by a telephone answering machine, rewound the tape recording to hear the message again and inadvertently heard another previously recorded message as well.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A30) is reported at 706 F.2d 1000.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1983. A petition for rehearing was denied on September 30, 1983 (Pet. App. A31). The petition for a writ of certiorari was filed on November 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner and 23 co-defendants were charged in a 24-count indictment in the Southern District of California with manufacturing and distributing methamphetamine. The case against petitioner and three other co-defendants was severed from the others, and after a jury trial, all four were convicted. Petitioner was convicted on one count of conspiracy to manufacture methamphetamine, in violation of

21 U.S.C. 841(a)(1) and 846 (Count 1), one count of conspiracy to possess methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and 846 (Count 2), three counts of manufacturing methamphetamine, in violation of 21 U.S.C. 841(a)(1) (Counts 3, 4, and 20), three counts of possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 5, 6, and 21), ten counts of using a communication facility to facilitate the distribution of methamphetamine, in violation of 21 U.S.C. 843(b) and 18 U.S.C. 2 (Counts 7-17), one count of interstate travel to promote a business enterprise involving controlled substances, in violation of 18 U.S.C. 1952(a)(3) (Count 18), and one count of conducting a continuing criminal enterprise, in violation of 21 U.S.C. 848(b)(2) (Count 23).[1] He was sentenced to a total of 20 years' imprisonment and was fined $200,000.[2] The court of appeals affirmed (Pet. App. A1-A30).

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[1]Co-defendants John Gaiefsky, Jack Gish, and Richard Shimel were also charged in Counts 1 and 2 as well as in various of the substantive counts. The district court granted a judgment of acquittal at the close of the government's case as to defendant Gish on Count 1 and as to petitioner on Count 9. The court of appeals affirmed the convictions of Gaiefsky on Counts 2 and 6 (Pet. App. A21-A24). The court of appeals affirmed the convictions of Shimel on Counts 1 and 2 and reversed his convictions on Counts 20 and 21 (Pet. App. A25-A28). The court also affirmed Gish's conviction on Count 2 (Pet. App. A28-A30). None of these three co-defendants has joined in this petition.

[2]The sentences were arranged as follows: five years each on Counts 1 and 2, to run consecutively to each other and concurrently with consecutive five-year terms on each of Counts 3, 4, 5, and 6; four years on each of Counts 7, 8, and 10-17, the sentences on Counts 7, 8, 10, 11, and 12 to run consecutively to each other, and concurrently with those on Counts 3, 4, 5, and 6, and the sentences on Counts 13-17 to run consecutively to each other, and concurrently with those on Counts 3, 4, 5, and 6; five years on each of Counts 18, 20, and 21, the sentences to run consecutively to each other and concurrently with those on Counts 3, 4, 5, and 6; and 20 years on Count 23, to run concurrently with the sentences imposed on Counts 3, 4, 5, and 6. The fines imposed were $30,000 on each of Counts 7, 8, 10, 11, 12, and 13, and $20,000 on Count 14.

1. The evidence at trial established that petitioner directed an extensive operation of manufacturing and distributing methamphetamine. The business included the establishment and operation of laboratories in Texas and California and a marketing system in a number of states (Pet. App. 2a).

In February 1980, petitioner flew to California and obtained permission to set up a methamphetamine laboratory in a house at 115 Midway Drive in Escondido, agreeing to pay the resident a fee for each batch of the drug that was produced (R.T. 1406, 1408).[3] Petitioner then directed Roger Loving to drive to California with chemicals to set up the laboratory in Escondido (R.T. 1207, 1211-1214). Once the laboratory was established in Escondido, petitioner began sending large amounts of methamphetamine from there to various distributors in Texas, receiving payment by means of Western Union money orders (R.T. 1226-1227).

In March 1980, three of petitioner's distributors, Roger Loving, co-defendant John Gaiefsky, and Debra Howard, went to Las Vegas with a quantity of methamphetamine, which Debra Howard sold. She returned to San Diego and delivered the money to petitioner (R.T. 1045-1047). On April 1 she sold more of the drug in Las Vegas and called petitioner in San Diego to make arrangements for more methamphetamine to be delivered to her there (R.T. 1051-1052). That evening Howard was arrested on an unrelated charge, following which she agreed to cooperate with the authorities (R.T. 1053-1055). Based on information she provided, police in California and Texas made a number of arrests and searched several buildings (Pet. App. A2).

One of these searches occurred at the 115 South Midway Drive address in Escondido, California. On April 15, 1980, several Drug Enforcement Administration (DEA) agents

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[3] "R.T." refers to the reporter's transcript of the trial. These references are taken from the government's brief in the court of appeals.

searched both a cottage and a large stucco house on the property, pursuant to a federal search warrant. The warrant authorized in part the seizure of "telephone books, diaries, photographs, utility bills, telephone bills, and any other papers indicating the ownership or occupancy of said residence." Pet. App. A7, A9.

When the police arrived at the cottage, only remnants of a laboratory remained there because petitioner had been alerted to the raid. The agents seized from the house a large number of photographs and documents, which included some items that were irrelevant, such as jewelry, love letters, marriage papers, and photographs not containing evidence of crime. The agents later returned the jewelry to its owners. They also seized two locked metal boxes from the bedroom of the large house. Many irrelevant items were contained in the boxes, but the agents also found drug paraphernalia inside, including a gram scale and precursor chemicals. Pet. App. A7.

On August 18, 1981, DEA agents obtained a warrant authorizing them to search for and arrest petitioner at 9898 Silva Road in El Cajon, California. They did not find him there, but, while the agents were still in the house, a telephone answering machine received, recorded, and played aloud an incoming call to petitioner from Susanne Hickey, another co-conspirator. After the agents heard the message as it was played aloud, they rewound the tape in order to hear the message a second time. In doing so, they inadvertently rewound the tape past the Hickey call to the beginning of the tape. When the agents replayed the tape, they heard another previously recorded call from a woman who had recently rented a house to petitioner. The agents called the number that she had left on the message and learned the address of the rented house. The agents then went there and found and arrested petitioner. Pet. App. A12-A13. At that

address the agents also discovered an operating methamphetamine laboratory, and they subsequently seized, pursuant to a search warrant, methamphetamine powder and drug laboratory equipment as well as various documentary evidence linking petitioner to that residence (*id.* at A18-A19).

The district court denied petitioner's motion to suppress evidence seized in these searches. The court of appeals affirmed his convictions (Pet. App. A1-A30). With respect to the issues presented here, the court held that the Midway Drive search was not conducted in flagrant disregard of the limitations of the warrant and hence provided no basis for suppressing the evidence introduced at trial, which was within the scope of the warrant (*id.* at A10-A12). The court also held that the agents did not violate the Fourth Amendment in overhearing the telephone call from petitioner's realtor that had been recorded on the tape. The court held that there was no expectation of privacy in the call that was originally broadcast over the machine to anyone within earshot, that the agents were entitled to replay the message, and that the discovery of the other message was "inadvertent." *Id.* at A13-A17.

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the search at 115 South Midway Drive exceeded the scope of the warrant in extending to certain private papers and belongings, and therefore that all evidence seized should be suppressed. This contention is without merit.

Petitioner's claim (Pet. 10) that the court of appeals reached a "novel" result that creates a "new exception" to the exclusionary rule could not be more misconceived. The courts of appeals have consistently held that items seized pursuant to a valid warrant are not to be excluded from evidence merely because the officers conducting the search

also seized items not specified in the warrant. See, *e.g.*, *United States* v. *Heldt*, 668 F.2d 1238, 1259-1269 (D.C. Cir. 1981), cert. denied, 456 U.S. 926 (1982); *United States* v. *Dunloy*, 584 F.2d 6, 11 n.4 (2d Cir. 1978); *United States* v. *Forsythe*, 560 F.2d 1127, 1134 (3d Cir. 1977); *United States* v. *Daniels*, 549 F.2d 665, 668 (9th Cir. 1977); *United States* v. *Mendoza*, 473 F.2d 692, 696-697 (5th Cir. 1972); *United States* v. *Holmes*, 452 F.2d 249, 259 (7th Cir. 1971), cert. denied, 405 U.S. 1016 and 407 U.S. 909 (1972). See also *Andresen* v. *Maryland*, 427 U.S. 463, 482 n.11 (1976). These decisions simply follow the well-established principle that evidence is not to be suppressed unless it is the "fruit" of an illegality. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963). Indeed, it would serve no useful purpose — and would seriously impair law enforcement while distorting the actions and judgments of law enforcement agents — to penalize an error in the execution of a warrant by suppressing not only the fruits of that erroneous act but all the evidence seized pursuant to the warrant.

Even assuming, as the court of appeals did (see Pet. App. A12), that where officers executing a warrant flagrantly ignore its limitations, the exclusionary rule might require suppressing even items seized pursuant to the warrant, that does not aid petitioner. The court of appeals, after examining the facts of this case in detail, concluded that the search did not reflect a flagrant disregard for the terms of the warrant (*id.* at A10-A12).

The court noted that there was some question whether the agents conducting the search were adequately prepared as to the precise terms of the warrant, and it disapproved the removal of large quantities of papers and other items that only "*might* have been relevant to who lived or worked there" (Pet. App. A11 (emphasis in original)). The court

recognized, however, that the type of search involved here, where the warrant authorized search and seizure of "indicia of ownership and control of the premises" created practical difficulties for the executing officers (Pet. App. A11). The court concluded that the agents did not show a flagrant disregard for the warrant (*id.* at A11-A12). There is no reason for this Court to reevaluate the court of appeals' determination that the authorities — given the practical difficulties of this type of search — did not so exceed the permissible limits of the warrant as to call for the extreme measure of suppression of items specified in a valid warrant.[4]

2. Petitioner also contends (Pet. 10-17) that the agents violated the Fourth Amendment when they inadvertently overheard a message previously recorded on his telephone answering machine. This contention is without merit. On the extremely unusual facts presented here, which raise no recurring or important issue requiring this Court's consideration, the court of appeals correctly concluded that there was no Fourth Amendment violation.

It is not disputed that the agents lawfully entered the house at 9898 Silva Road in order to execute a search warrant for petitioner (see Pet. App. A14). While they were present, they unavoidably heard an incoming telephone call from Susanne Hickey as it was broadcast by a telephone answering machine. Obviously, the agents' overhearing of this call did not violate the Fourth Amendment. See, *e.g.*, *Texas* v. *Brown*, No. 81-419 (Apr. 19, 1983), slip op. 9 (plurality opinion); *Katz* v. *United States*, 389 U.S. 347, 351 (1967).

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[4]Only those things authorized by the warrant to be seized were admitted into evidence; the trial court ordered all irrelevant items to be returned (*id.* at A12).

Contrary to petitioner's contention (Pet. 17), the telephone call overheard by the agents clearly appears to have been incriminating. They recognized the voice of Hickey, a co-conspirator for whom they also had an arrest warrant, saying something to the effect of "The narcs are coming over to get me. * * * Somebody better * * * tell me what to do" (H. Tr. 643).[5] After hearing the broadcast of this message, the agents had probable cause to believe that the tape contained evidence that petitioner was engaged in narcotics traffic, and therefore they were authorized to seize it. See, *e.g.*, *Texas* v. *Brown*, slip op. 10-11 (plurality opinion). Before taking that step, however, it was reasonable for the agents to attempt to listen to the message again to confirm their suspicion that it was incriminating because they were not certain that they had heard the message correctly the first time (see H. Tr. 644-645).[6] Once the agents were lawfully attempting to listen again to the message they had already heard, the Fourth Amendment was not violated when they inadvertently, as both the district court and court of appeals found (see Pet. App. A17), overheard another message on the tape.

Petitioner's reliance (Pet. 12-13) on *Walter* v. *United States*, 447 U.S. 649 (1980), to challenge the validity of listening to the message again is misplaced. In *Walter*, although the private parties had already opened the packages and exposed the labels on the film containers, the films themselves had not been viewed until the government agents themselves viewed them. Thus, the projection of the

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[5]"H. Tr." refers to the transcript of the suppression hearing.

[6]Indeed, the agents' action in listening again to the message they had already heard to doublecheck their suspicion prior to seizing the tape was in a sense more protective of petitioner's interests because, if they proved to have been mistaken, it might have obviated the need to seize the tape.

films constituted an additional search, beyond any previously undertaken, that would be expected to disclose information not known to the officers; it is for that reason that the Court held that a warrant should have been obtained. See 447 U.S. at 656-657 (opinion of Stevens, J.). Here, by contrast, the broadcast of the incoming telephone call overheard by the agents exposed the entire contents of the simultaneously recorded message. There was no invasion of privacy in listening again to the tape recording of the message, when the agents had already heard what was recorded. See generally *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983), slip op. 5-7. See also *Walter*, 447 U.S. at 656, 659 n.14 (Stevens, J.); *id.* at 661 (White, J.); *id.* at 663 (Blackmun, J., dissenting); *United States* v. *Brand*, 556 F.2d 1312, 1317 (5th Cir. 1977), cert. denied, 434 U.S. 1063 (1978).[7]

Finally, petitioner complains (Pet. 13-16) that the court of appeals erred in declining to consider, on the ground that it was not properly raised below, his claim that the agents had already overstayed their lawful presence on the premises when they overheard the telephone messages (see Pet. App. A14-A16). However, this was clearly a proper exercise of the court of appeals' authority. See Fed. R. Crim. P. 12(b)(3) and (e). Because the issue was not raised in the district court, a complete factual record was not made on this question at the suppression hearing, and the district court was not asked to and did not make a finding on it. Thus, the court of appeals had no basis on which to assess

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[7]Had the agents deliberately listened to the portion of the tape that they had not heard before, *Walter* would indeed be relevant and would suggest that the agents' action was an unlawful search. However, both courts below found that the agents inadvertently overheard the other message, and there is no reason for this Court to reexamine that factual determination. See, *e.g.*, *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

petitioner's claim and acted properly in refusing to consider it for the first time on appeal.[8]

Petitioner's further contention (Pet. 15-16) that, in light of the court of appeals' refusal to consider this claim, the government failed to carry its burden of proving that the agents were lawfully on the premises is fanciful. It is undisputed that the entry into the house was authorized by a valid search to arrest warrant (Pet. App. A14). This showing plainly satisfied the government's burden of proof in the absence of any showing by petitioner that would rebut the fact of lawful presence on the premises.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]To the extent the record sheds any light on the question, it suggests that the agents likely were lawfully in the house when they heard the telephone call. It took some time to make certain that petitioner was not present and to interview the people who were in the house in order to determine whether they too were wanted on arrest warrants (see H. Tr. 511-515). The record does not indicate that the agents remained on the premises beyond the time necessary to fulfill their duties in connection with the warrant.